Dec 16. 78 Sub 1158

Note p 179
Oct T. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 707.

WILLIAM S. McKNIGHT AND JAMES W. RICHARDSON, APPELLANTS,

vs.

THE UNITED STATES.

No. 708.

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM S. McKNIGHT AND JAMES W. RICHARDSON.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 1, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 707.

WILLIAM S. McKNIGHT AND JAMES W. RICHARDSON, APPELLANTS,

vs.

THE UNITED STATES.

No. 708.

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM S. McKNIGHT AND JAMES W. RICHARDSON.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition. Filed July 28, 1877	1	1
Traverse	5	2
Plea of limitation	6	3
Set-off and counter-claim	7	3
Replication to plea of set-off, &c	8	3
Findings of fact and conclusion of law	9	3
Opinion of the court	12	7
Final judgment	23	17
Application of claimants for and allowance of appeal	24	17
Application of defendants for and allowance of appeal	25	18
Certificate	26	18

1 I. *Petition.—Filed July* 28, 1877.

In the Court of Claims.

WILLIAM S. MCKNIGHT AND JAMES W. RICHARDSON
vs.
THE UNITED STATES. } No. 11717.

The petitioners, William S. McKnight and James W. Richardson, heretofore trading under the firm-name and style of McKnight & Richardson, by their petition, respectfully show to the court, as follows:

First. William S. McKnight is a citizen of the State of Illinois, and a resident of the city of Chicago; and James W. Richardson is a citizen of the State of Tennessee, and a resident of the city of Memphis, and they present this petition in their own behalf.

Second. Prior to the 11th day of May, 1861, they were merchants doing business in their firm-name in El Paso, in the State of Texas, and prior to that time, one Simeon Hart was engaged in the business of furnishing supplies for the Army of the United States in that locality. That the said Simeon Hart was in the habit of borrowing money from the petitioners for the purpose of enabling him to fulfill his contracts to furnish beef, flour, &c., to the Commissary Department of the United States Army; and that prior to the 11th of May, 1861, he had so

2 borrowed a large sum of money from the petitioners, and, for the purpose of reimbursing them for such loans, he was accustomed to assign and deliver to them vouchers issued to him by the authority of the United States. On or about the 11th day of May, 1861, a voucher was issued to him by one John B. Grayson, a brevet lieutenant-colonel in the United States Army, and a commissary of subsistence, for the sum of $30,778.18, which voucher was issued by said commissary in the ordinary course of business, for supplies furnished to him by the said Simeon Hart. Said voucher was afterwards assigned in blank by said Hart in the ordinary manner of making such assignments, by signing a blank receipt at the foot thereof, and, after having been assigned the said voucher was delivered by the said Simeon Hart to your petitioners.

Third. Afterwards your petitioners presented the said voucher to the proper department of the United States for payment. Various questions were raised in opposition to the payment of the said voucher, but all of these questions were eventually decided in favor of the claimants, and on or about the 6th day of January, 1873, the proper accounting officers of the Treasury allowed to the petitioners the sum of $30,675.68 on account of the said voucher; and thereupon an account was stated and properly certified by the Comptroller of the Treasury, showing a balance in favor of your petitioners, of the sum of $30,675.68. Soon after that a requisition was duly issued by the Secretary of War upon the Secretary of the Treasury, for the said amount of money to be paid to the said claimants in satisfaction of the amount so found to be due to the petitioners.

Fourth. When the said requisition was received at the Treasury Department, instead of paying the amount to the petitioners, as required

3 by law, the Secretary of the Treasury, in violation of law and of his duty, assumed and exercised the power of directing two drafts to be issued upon the said requisition—one of them was for the sum of $21,675.68, and the other for the sum of $9,000.00. The first of

these drafts was made payable to the order of your petitioners and was subsequently paid to them, but the second draft, for the sum of $9,000.00, was unlawfully made payable (as your petitioners are informed and believe) to the order of the Treasurer of the United States, and was, without any warrant of law, delivered to him, and by him endorsed, and the money paid into the Treasury of the United States. Your petitioners are advised by counsel, and believe, that the said account as stated by the proper accounting officers of the Treasury, ascertaining and declaring the balance due to your petitioners, was final and conclusive upon the executive officers of the government, and that thereupon they became entitled to demand and have of the United States the said sum of money, and an action thereupon accrued to them by virtue of the said decision of the accounting officers, and the act of Congress in such case made and provided, which act was approved March 30, 1868; and they are further advised, and believe, that the action of the Secretary of the Treasury was without warrant of law, in violation of the rights of your petitioners, and null and void.

Fifth. No part of the said sum of $9,000.00 has ever been paid to your petitioners, although they have frequently demanded payment, but the same is still due to them together with interest, whereupon they bring this suit.

Sixth. They are the sole owners of the said claim, and have never assigned or disposed of it, or any part of it, to any person. They have at all times borne true allegiance to the Government of the United States.

4 The petitioners therefore pray judgment against the United States for the said sum of nine thousand dollars ($9,000.00).

WM S. McKNIGHT,
JAMES W. RICHARDSON.

ENOCH TOTTEN,
Solicitor for Petitioners.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, William S. McNight, being first duly sworn on the Holy Evangely of Almighty God, do depose and on my oath say that I am one of the claimants named in the foregoing petition; that no assignment or transfer of said claim or interest therein has been made; that the said firm of McKnight & Richardson is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and I believe the facts as stated in said petition are true.

WM S. McKNIGHT.

Subscribed and sworn to by William S. McKnight, one of the claimants in the above entitled cause, before me this 28th day of July, A. D. 1877.

[SEAL.] SAM'L C. MILLS, *J. P.*

5 II. *Traverse.—Filed August* 16, 1877.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimants herein; and not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that

the United States are indebted to the said claimants in the sum of nine thousand dollars, says that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney General.

6 III. *Plea of limitation.—Filed August* 16, 1877.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.,

THOMAS SIMONS,
Assistant Attorney-General.

7 IV. *Set off and counter-claim.—Filed April* 9, 1878.

The said defendants, by the Attorney-General, come, and for a further plea in this behalf say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because the said plaintiffs before and at the time of filing their petition were and still are indebted to the defendants in a large sum of money, to wit, $21,675.68, for moneys paid to the said plaintiffs by the officers of the Treasury Department of the United States; that is to say, for the amount of a draft dated January 31, 1873, drawn by L. R. Tuttle, assistant treasurer of the United States, on the assistant treasurer of the United States at New York, to the order of William S. McKnight and James W. Richardson, firm of McKnight & Richardson, assignees of Simeon Hart, which draft was by the plaintiffs indorsed, and, on the 7th February, 1873, paid by the assistant treasurer of the United States at New York, the said draft having been issued and paid without authority of and contrary to law.

Wherefore the defendants pray that judgment be entered against the plaintiffs for the sum of $21,675.68.

THOMAS SIMONS,
Assistant Attorney-General.

8 V. *Replication to counter-claim.—Filed April* 10, 1878.

And now come the said plaintiffs, and for replication to the counter-claim pleaded by the defendants, say that they never were indebted as alleged.

ENOCH TOTTEN,
Att'y for Plaintiffs.

9 VI. *Findings of fact and conclusion of law.—Filed April* 29, 1878.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 6th of January, 1873, the Second Comptroller of the Treasury certified to the Secretary of War a balance arising on an account settled by the Third Auditor, as follows:

"No. 6611.] "TREASURY DEPARTMENT,
"SECOND COMPTROLLER'S OFFICE,
"*January 6th*, 1873.

"I certify, in conformity with law, that there is due from the United States to William S. McKnight and Ja's W. Richardson, composing the firm of McKnight and Richardson, assignees of Simeon Hart, a government contractor, a balance of thirty thousand six hundred and seventy-five and $\frac{68}{100}$ dollars:

"Which amount is allowed in pursuance of the decision of the Second Comptroller, made December 14, 1872, being for the value, at contract rates, of 51,920 lbs. of flour, delivered at Albuquerque, New Mexico, May 13, 1861, at 20½ c'ts per lb	$10,643 60
"May 23, 1861, 49,800 of flour delivered at Fort Stanton, at 18½ c'ts per lb	9,213 00
"May 26, 1861, 52,776 lbs. flour delivered at Albuquerque, at 20½ c'ts per lb	10,819 08
Total	$30,675 68

"A report in favor of the payment of said balance having been made by the Judge-Advocate-General, and approved by the Secretary of War, February 28, 1872, and the allowance being in conformity with the opinion of the Attorney-General, dated Dec. 5, 1872.

"Payable out of the appropriation for subsistence of the Army prior to July 1, 1870.

"To the claimant assignees, McKnight and Richardson.

"In the care of H. D. Cook, attorney of record, present.

"J. M. BRODHEAD,
"*Comptroller.*

"Hon. W'M W. BELKNAP,
"*Secretary of War.*"

II. Subsequently the following requisition, with memorandum attached, was signed and recorded:

"*Settlement requisition No. 2254.*

"WAR DEPARTMENT, *Jan'y* 31, 1873.

"*To the Secretary of the Treasury:*

"SIR: Please to cause a warrant for thirty thousand six hundred and seventy-five dollars and sixty-eight cents to be issued in favor of William S. McKnight and James W. Richardson, composing the firm of McKnight and Richardson, assignees of Simeon Hart, a government contractor, care of H. D. Cook, attorney of record, present:
10 due on settlement as per certificate of Second Comptroller, No. 6611. To be charged in the undermentioned appropriations.

"Given under my hand this 7th day of January, 1873.

"$30,675.68.

"W'M W. BELKNAP,
"*Secretary of War.*

"Countersigned Jan'y 7, '73.—S. B. P.

J. M. BRODHEAD,
"*Second Comptroller.*

"Registered Jan'y 7, '73.—R. S. J.

"ALLAN BUTHERFORD,
"*Third Auditor.*

"Appropriations:

"Subsistence of the Army prior to July 1, 1870 ..... $30,675 68

"Of this amount the sum of nine thousand dollars ($9,000) will be paid to the Treasurer of the U. States, to be by him deposited in the Treasury on 'general account,' on account of a debt due the U. States by Simeon Hart as surety on a bond given by Lieut. Col. John B. Grayson, com'y of subs., to await the final adjustment and decision of Grayson's accounts.

"J. M. BRODHEAD,
"*Compt.*"

III. Thereupon the following warrant was drawn, signed, and recorded:

"WAR SETTLEMENT WARRANT No. 409. $30,675.68.

"*Appropriations.*

"Special.
J. H. SEVILLE,
"*Chief Clerk.*

"71. Subsistence of Army, $30,675.68.

"It is directed that of the amount of this warrant the sum of nine thousand dollars ($9,000) be paid to the Treasurer of the United States, to be by him deposited in the Treasury, in 'general account,' on account of a debt due the U. S. by Simeon Hart, as surety on a bond given by Lieut. Colonel John B. Grayson, commissary of subsistence.
[SEAL.] "GEO. S. BOUTWELL,
"*Secretary.*

"C. F. C.
"Record draft No. 615.
"H. D. COOK."

"TREASURY DEPARTMENT.

"TO THE TREASURER OF THE
"UNITED STATES, greeting:

"Pay to William S. McKnight and James W. Richardson, firm of McKnight & Richardson, assignees of Simeon Hart, care of H. D. Cook, att'y of record, present, or order, to be charged to the appropriations named in the margin, thirty thousand six hundred and seventy-five dollars and sixty-eight cents, due Simeon Hart on settlement, pursuant to a requisition, No. 2254, of the Secretary of War, dated January 7th, 1873, countersigned by the Second Comptroller of the Treasury and registered by the 3d Auditor. And for so doing this shall be your warrant.

"Given under my hand and the seal of the Treasury Department this 31st day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of Independence the ninety-seventh.

[SEAL.] "J. F. HARTLEY,
"*Ass't Secretary.*

"C. F. C.

"Countersigned 31st.—S. W. S.
"R. W. TAYLER,
"*First Comptroller.*

"Registered 31st.—T. R. S.
"J. A. GRAHAM,
"*Ass't Register.*"

11 IV. Upon said warrant the following draft was issued to said McKnight & Richardson, delivered to H. D. Cook, attorney, indorsed by claimants and paid by defendants.

"*Draft No.* 615 *on warrant No.* 409, *p't, series of* 1870, *c.*

"TREASURY OF THE UNITED STATES,
Washington, D. C. January 31*st*, 1873.

"Pay to William S. McKnight & James W. Richardson, firm of Mc-

Knight & Richardson, assignees of Simeon Hart, or order, twenty one thousand six hundred and seventy-five $\frac{65}{100}$ dollars.

"L. R. TUTTLE,

$21,675.\frac{65}{100}$ *Asst. Treasurer of the United States.*

"Registered Jan'y 31st, 1873.

"JOHN ALLISON,

"*Register of the Treasury.*"

And at the same time the following draft was issued to the Treasurer, by him indorsed, and the amount therein specified deposited in general account as ordered: and the same has never been paid out of the Treasury of the United States:

"*Draft No. 616 on war-warrant No. 409, p't, series of 1870, d.*

"TREASURY OF THE UNITED STATES,

"*Washington, D. C., January 31st, 1873.*

"Pay to Treasurer of the U. S., to be deposited in 'general account,' on account of a debt due the U. S. by Simeon Hart, as surety on a bond given by Lt. Col. John B. Grayson, Comm'y of Sub., or order, nine thousand dollars.

"L. R. TUTTLE,

"$9,000. *Asst. Treasurer of the United States.*"

V. Said certificate of the Second Comptroller, requisition of the Secretary of War, and warrant of the Secretary of the Treasury, were founded upon the alleged voluntary indorsement, order, or assignment by Simeon Hart, of a voucher filed in the Treasury Department, alleged to have been issued by Lt. Col. John B. Grayson, Commissary of Subsistence of the United States Army, for flour delivered by him in May, 1861, under contracts; but the claimants did not prove or offer to prove, at the trial in this court, the genuineness of said voucher or the indorsement, order, or assignment thereof, or the delivery of the flour therein mentioned.

ADDITIONAL FINDING MADE AT REQUEST OF CLAIMANTS.

VI. The following is a copy of the voucher upon which said account was settled, as transmitted by the Secretary of the Treasury to this court:

"*The United States to Simeon Hart, Dr.*

"1861.		
"May 13.	To 51,920 lbs. flour, delivered at Albuquerque, under the contracts of 3rd & 10th Nov., 1860, at 20½ c'ts	10,643 60
" " 23.	To 49,800 lbs. flour, delivered at Fort Stanton, under the contract of 10th Nov., 1860, at 18½ c'ts p'r lb	9,213 00
" " 26.	To 52,776 lbs. flour, delivered at Albuquerque, under the contracts of 3rd & 10th Nov., 1860, at 20½ c'ts lb	10,819 08
" " 30.	To 500 lbs. flour, delivered at Albuqu'e, to make up short delivers under the contracts of 3rd & 10th Nov., 1860, at 20½ c'ts lb	102 50
		$30,778 18

"I certify that the above is correct and just: that the services were rendered as stated, and necessary for the public service.

"I certify on honor that the above account is correct and just; that this flour has been faithfully issued; that I have accounted for this flour by the receipts of officers duly qualified to receive the same; that it was purchased at the prices mentioned and contracted for (see contracts of 3rd & 10th Nov., 1860); and that Judge Hart is entitled to the amount specified on the face of this account; and I have not paid this account, owing to the order of the Secretary of War, through the Commissary-General, of 11th May, 1861.

"JNO. B. GRAYSON.
"*Bvt't Lt. Col., C'ry Sc.*

"Received 185 , of , U. S. Army, thirty thousands seven hundreds seventy eight dollars and eighteen cents *cents*, in full of the above account.

"S. HART."

ADDITIONAL FINDING MADE AT REQUEST OF DEFENDANTS.

VII. No assignment or power of attorney to collect the claim was executed or delivered by Simeon Hart or his personal representatives after the settlement warrant set forth in the third finding was drawn and signed.

CONCLUSION OF LAW.

The claimants are not entitled to judgment in their favor and their petition must be dismissed, for the reasons stated in the opinion of the court.

VII. *Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court:

The claimants prove and rely upon a certificate of the Second Comptroller of the Treasury, made to the Secretary of War January 6, 1873, certifying a balance of $30,675.68 to be due to them as assignees of Simeon Hart, a government contractor, for flour delivered by him; a requisition of the Secretary of War upon the Secretary of the Treasury, requesting him to cause a warrant to be issued thereon for the certified balance; and a warrant by the Assistant Secretary of the Treasury, addressed to the Treasurer, dated January 31, 1873, duly countersigned and registered, for the payment of the same, upon which there is a memorandum signed by the Secretary of the Treasury, directing that, of the amount, $9,000 be paid to the Treasurer, and deposited by him in the Treasury, in general account, on account of a debt due the United States by Simeon Hart, as security on a bond given by Lieut. Col. John B. Grayson, commissary of subsistence. Upon the warrant a draft for $21,675.68 was drawn and issued to claimants by the Treasurer and paid on presentation. The balance of $9,000 was deposited in the Treasury according to said direction of the Secretary; and it is for the recovery of this balance that suit is now brought.

It further appears that the certified allowance by the accounting officers was made upon an alleged voluntary order, indorsement, or assignment by Simeon Hart, of a voucher alleged to have been issued to him by J. B. Grayson, a commissary of subsistence, for flour delivered in May, 1861, under contract, but neither the delivery of the flour nor the

genuineness of the voucher or assignment thereof was proved in this court, except by what is claimed to be prima facie evidence from the documents, of which copies are produced. Thus the claimants rely entirely upon the certificate of the balance found due by the Comptroller, the requisition of the Secretary of War, and the warrant of the Assistant Secretary of the Treasury, claiming that the action of the Secretary of the Treasury, in directing, by his memorandum on the warrant, a diversion of the money from the parties to whom it had been found to be due, and its application to another object, was unauthorized, and of no legal effect as against them in this action.

It will contribute to a correct determination of the force and effect of the acts of the public officers thus relied upon, to consider carefully how accounts and claims against the government are settled throughout the several processes of settlement, examination, and certification to which they are subjected.

The Revised Statutes, § 236, require that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

The principal officers to whom this great responsibility is committed by law, are called "accounting officers," consisting of six Auditors (R. S., § 276), each acting separately upon different classes of accounts; and the Commissioner of the General Land Office, who is also an auditor of all public accounts relative to the public lands (R. S., § 456); two Comptrollers (R. S., § 268), each also acting separately in like manner; and a Commissioner of Customs, whose duties were transferred from the First Comptroller, and who, under another name, is a comptroller in matter of accounts relating to customs (R. S., §§ 316–318).

There are also other officers through whom accounts must pass for different purposes, in the Treasury Department and elsewhere, before payment is made, whose duties in connection therewith we shall refer to as we note in detail the course of business in settling accounts from the time a demand is brought to the Treasury Department until final payment thereof.

Accounts accruing in the War Department, relating to the pay and clothing of the Army, the subsistence of the officers, bounties and premiums, military and hospital stores, ordnance, recruiting, medical, Freedmen's Bureau, Soldiers' Home, and for contingent expenses, are received and examined by the Second Auditor. Those relating to the subsistence of the Army and the Quartermaster's Department, engineers, river and harbor surveys and improvements, compensation for losses of horses and equipments of officers and enlisted men in the military service, for the losses of horses and equipments, or of steamboats and all other means of transportation, in the service of the United States,
14 by contract or impressment, and generally all accounts of the War Department, other than those provided for, are received and examined by the Third Auditor (R. S., § 277). When examined, the Auditor certifies in each case the balance, and transmits the account, with the vouchers and certificate, to the Second Comptroller for his decision thereon (R. S., §§ 273, 277).

The Second Comptroller examines the same and certifies the balance arising thereon, and his certificate is returned, with the vouchers, to the Auditor, who transmits the certificate to the Secretary of War, in whose department the expenditures have been incurred, for a requisition thereon (R. S., § 273).

The Secretary of War, upon this certificate, draws a requisition on the Secretary of the Treasury, requesting him to cause a warrant for the amount specified to issue in favor of the claimant, to be charged to the appropriation to which specific reference is made (R. S., § 3673).

The requisition signed by the Secretary of War is forwarded by him to the Second Comptroller, who countersigns the same (R. S., § 273), and sends it to the Auditor by whom the account was first audited.

The certificate is returned to the Auditor, who files the same with the vouchers in his office, records the requisition, certifies to it, and sends it to the Secretary of the Treasury (R. S., § 283).

A warrant is then drawn in the warrant division of the Secretary's office and charged to the proper appropriation. The warrant is addressed to the Treasurer of the United States, directing him to pay to the person named the amount specified, to be charged to the appropriation named in the margin (R. S., §§ 248, 3675). This is examined by one of the Assistant Secretaries (R. S., § 245), and is signed either by the Secretary, or, in certain cases, by special appointment of the Secretary, by one of the assistants (R. S., § 246). It then goes to the First Comptroller, who countersigns the same, it being his duty "to countersign all warrants drawn by the Secretary of the Treasury which shall be warranted by law" (R. S., § 269). It is next sent to the Register, who, after recording and certifying to the same, transmits it to the Treasurer.

The Treasurer thereupon draws a draft, payable by the Treasurer in Washington, or elsewhere by an assistant treasurer or designated depositary, to the order of the person named in the warrant, signs the same, transmits it to the Register for record and certification by him, and on its return delivers it to the party to whom it is made payable, or his attorney, or to whomever he may order, unless the Secretary of the Treasury, by a memorandum on the warrant, otherwise directs. The Treasurer relies wholly upon the warrant as it reaches him under the signature of the Secretary or an Assistant Secretary of the Treasury, and he strictly follows its directions as his authority and justification.

Then, and not till then, is the settlement consummated and payment authorized (R. S., §§ 3593, 3644).

Accounts of the Navy Department are settled in the same manner, except that they go to the Fourth Auditor (R. S., § 277), and the requisition is drawn by the Secretary of the Navy (R. S., § 273). So are the accounts relating to Indian affairs and to agents of lead and other mines, except that they go to the Second Auditor, and accounts relating to pensions of the Army, which go to the Third Auditor, and those relating to pensions of the Navy, which go to the Fourth Auditor (R. S., § 277), and all require requisitions from the Secretary of the Interior instead of other heads of departments (R. S., § 444); but they are passed upon by the Second Comptroller, and in all other respects are
15 subject to the same departmental processes as stated with reference to claims on the War Department.

As to the settlement of the accounts of other departments there is some variation in the course of business from that which we have stated.

The First Auditor receives and examines all accounts accruing in the Treasury Department; accounts of salaries in the Patent Office; of judges, marshals, clerks, and other officers of courts; of the officer in charge of the public buildings and grounds in the District of Columbia; of the Congressional Printer; of expenditures for the Department of Agriculture; for public buildings and for prisoners convicted by United States courts, and certifies the balances and transmits the same with the

vouchers, those relating to the customs to the Commissioner of Customs, and all others to the First Comptroller (R. S., § 277). The Fifth Auditor receives and examines all accounts relative to the State Department, all accounts of the Commissioner of Internal Revenue, and those relating to the contingent expenses of the Patent Office and the Post Office Department, and accounts of the census, and certifies the balances to the First Comptroller (R. S., §§ 273, 277).

The Commissioner of the General Land Office also certifies the balances found by him, as an auditor, to the First Comptroller (R. S., § 456).

The Commissioner of Customs examines the accounts thus transmitted to him, and certifies the balances arising thereon to the Register, and there his duty ends.

The First Comptroller in like manner certifies the balances arising on the accounts thus transmitted to him directly to the Register (R. S., § 269), by whom the accounts, vouchers, and certificates are filed and preserved (R. S., § 313), and a copy of the certificate in each case sent to the Secretary of the department in which the expenditure has been incurred (except when it is the Treasury Department), who indorses thereon a request to the Secretary of the Treasury to "please cause a warrant to be issued in accordance with the certified copy of settlement," and forwards the same to the Secretary of the Treasury, in the warrant division of whose office it is then filed as a basis for drawing a warrant.

When the expenditure has been incurred in the Treasury Department, the Register transmits to the Secretary of the Treasury copies of the certificates of balances adjusted (R. S., § 313), and they are sent to the warrant division, and warrants issue, and other proceedings are had precisely as in accounts which pass the Second Comptroller, as before explained.

There are kept in the warrant division of the office of the Secretary of the Treasury, and in the offices of the Register and First Comptroller, separate appropriation-accounts, in which are credited the amounts appropriated by Congress to each specific object, the Secretary issuing appropriation-warrants to the Register and Comptroller therefor. These accounts, in each of those three offices, are charged with all warrants from time to time, drawn against them respectively (R. S., §§ 113, 3675). And the Second, Third, and Fourth Auditors, performing the duties of register for the War, Navy, and the Interior Departments, in whole or in part, also keep like appropriation-accounts for those departments (R. S., § 3673). Thus the different officers of the Treasury Department have checks upon each other in the drawing of money from the public funds.

The Post-Office Department accounts are kept, audited, controlled, and paid in an anomalous manner, as compared with all other
16 government accounts. All the revenues deposited in the Treasury on account of that department stands to the credit of the Treasurer of the United States for service of the Post-Office Department, and there is no comptroller of accounts as a separate officer (R. S., §§ 406, 407, 408, 3642, 3643, 3674). Accounts are examined by the Sixth Auditor, who performs not only the duties ordinarily belonging to an auditor, but also those of a register and a comptroller (R. S., § 277). When he certifies a balance due, a warrant therefor is drawn on the Treasurer for the amount, signed by the Postmaster-General and countersigned by the Sixth Auditor. It is then transmitted to the Treasurer, who records the same, directs, by an order on the face thereof,

its payment out of the Treasury, and returns it to the Postmaster-General.

This is not only a warrant, but is a draft also, payable to the order of the creditor, and is delivered to him for collection, and upon that warrant and draft payment is made, the funds of that department not being subject to the warrant of the Secretary of the Treasury, as are other public moneys in the Treasury (R. S., §§ 3642, 3674).

If the Postmaster-General, or any person whose account has been settled by the Sixth Auditor, is dissatisfied with the settlement, he may, within twelve months, appeal to the First Comptroller, whose decision shall be conclusive (R. S., § 270).

Such is the method of the final settlement of all accounts in the Treasury, omitting much detail which occurs in carrying on the general course of business.

But vast sums of money are paid to parties for salaries and on other accounts by disbursing officers before the claims have passed the Treasury accounting, and the number of such officers is large, their appointments being provided for by special or general provisions of statute (R. S., §§ 56–58, 62, 176, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3646, 3648, 3658, 3677, 4839, &c., &c.). They are all under bonds, and are responsible for the legality and correctness of their payments. Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement (R. S., §§ 3522–3525; McKee vs. United States, 12 Ct. Cl. R., 553).

Most of the accounts of the State Department are paid in that manner through different disbursing officers and otherwise, before being finally audited, and so are all those of the Department of Agriculture, the Commissioner of Agriculture being himself the disbursing officer (R. S., § 3677), and neither he nor the Secretary of State draws requisitions, or requests, for settlement-warrants to issue on the certified balances of the accounting officers. To these disbursing officers the money is advanced on advance-warrants drawn in most cases by requisition or request from the heads of the departments in which the money is required, recognized by statute as to the Secretary of the Senate, the Attorney-General, and Secretary of the Interior (R. S., §§ 56, 369, 444), and allowed in practice as to all the departments. The money advanced thereon is passed to the credit of the disbursing officers by the Treasurer, the assistant treasurers, or designated depositaries, and drawn by them only on their checks when required and under rules to which they are made subject by department orders and statute provisions, or is received and paid out in cash (R. S., §§ 3620–3623).

Coupons on bonds and quarterly-interest checks of the public debt are paid on presentation, without advance-warrants being drawn
17 therefor, but the Treasurer is reimbursed monthly by warrants drawn on his requisitions, by the Secretary of the Treasury, for the amounts thus paid, and subsequently they pass the accounting officers as items of credits in his accounts. But interest on registered bonds (except that on the funded loans, so called, which is paid by checks) is always advanced to the Treasurer and assistant treasurers, upon advance-warrants as in other cases.

Consuls in foreign countries draw drafts upon the Secretary of the

Treasury or Secretary of State to the extent of what appears to be due them, and so do sometimes the ministers of the United States to other governments, although generally the latter officers draw upon the agents or disbursing officers appointed for that and other like purposes in London. These drafts are paid on warrants drawn upon requisitions of the Secretary of State, and are charged to the respective drawers, to be accounted for on final settlement; and the accounts of all these officers are finally examined and passed upon by the accounting officers, and payments thus advanced are charged against them.

These different processes in the settlement of claims and demands upon the government from their receipt by the Auditor, through the several stages of examination, certification, and drawing of warrants for payment up to the time when the Treasurer issues his drafts, are all matters of accounting, to justify the Treasurer in paying out the public money, and are not consummated beyond recall until the claimants receive the negotiable drafts of that officer, drawn according to the convenience of parties upon the Treasury proper in Washington, or upon one of the several assistant treasurers or designated depositories in some other place.

Such drafts are understood to constitute new contracts on the part of the government, into which the previous claims upon which they issue are merged, and are valid and binding upon the United States in the hands of bona fide holders, by indorsement, for valuable consideration, as commercial bills of exchange and promissory notes are between individuals, whatever valid objections or defences there may have been to the original [J. R.] claims and accounts upon which the settlements were made and drafts issued (R. S., § 308; The Floyd Acceptances, 7 Wall., 666).

The certificates and orders made previously to the issuing of the drafts are departmental proceedings, directions among the several public officers, none of which are delivered to the claimants, or even allowed to be seen and examined by them without leave from some officer having authority to grant it. Parties gain no new rights thereby, into which their former rights of action are merged, and upon which actions can and must be brought as upon an award. There is nothing in the proceedings in the nature of a submission to arbitration.

But if the whole has the semblance of an adjudication and award, the conclusion of it is the amount of money authorized to be paid out of the Treasury to the claimants, for all that is the final object of the processes of accounting; and it is the result which arbitrators reach, and not each different step in the processes by which they arrive at the same, taken separately and independently, that determines the rights of parties thereto, if the arbitrators act within the scope of their jurisdiction. And it may be regarded as settled law, in accordance with the uniform practice, that the accounting officers have jurisdiction, in proper cases, in the course of settling accounts in the Treasury Department, to set off one debt against another, when a claimant is both debtor and creditor (R. S., § 1766; Gratiot vs. United States, 15 Pet., 370).

In the present case, the Comptroller, by his memorandum on
18 the requisition, which was part of his official action in the matter, directed that only $21,675.68 should be paid to the claimants, and the Secretary of the Treasury made a like memorandum upon his warrant, so that they have received all that the public officers finally determined to allow to be paid to them. The Secretary followed the direction of the Comptroller, and did not undertake to alter the determination of that officer or to introduce any new order of his own. If the

Comptroller's determination is conclusive at all, it is conclusive in whole, and not in part, and was so regarded by the Secretary of the Treasury.

In matters of accounting, the several public officers act independently of each other, although the Secretary of the Treasury, being the head of the department, has a right generally to control or revise to some extent the action of others in subordinate official positions, and a Comptroller has some power over an Auditor (R. S., § 271), and is not bound by the action of that officer which is certified to him.

For a long series of years, extending from the first organization of the Treasury Department to 1868, there was a controversy as to how far, if at all, the balances and action of a Comptroller were subject to revision and change by the heads of departments or the President. Upon the advice of several Attorneys-General, the question was practically settled against the right of the President and in favor of that of the Secretary of the Treasury. But the Comptrollers yielded with reluctance, and in 1868 an act was passed, which is now incorporated into the Revised Statutes as section 191, which provides that the balances certified by the Comptrollers "shall be conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts." We had occasion, in a former opinion, to review this controversy with care, and it is unnecessary to repeat here what we said then, which may be found in the report of the case of McKee vs. The United States (12 C't Cl. R., 553).

It is provided, as we have seen, that an appeal may be had from the Sixth Auditor to the First Comptroller in certain cases, and the decision of the latter officer is declared to be conclusive (R. S., § 270). But this conclusiveness is probably intended to be no more than that of other decisions of the Comptroller above referred to (R. S., § 191), that is, conclusive upon the executive branch of the government, but not upon Congress or the courts.

The object of the act of 1868 (R. S., § 191) appears to have been to settle a long-standing controversy, and render the Comptrollers independent in their action of the heads of departments in certifying balances of accounts, and not to give to the decisions of those officers the character of awards absolutely binding upon the United States. It will be observed that the independence of the Comptrollers provided for by that act only extends to the certified balances, which cannot be changed or modified by other executive officers: but in all other matters of accounting the superiority of the power of the Secretary of the Treasury is not modified, but is left as it was before.

In a case decided in the Supreme Court, wherein by special act Congress directed the Postmaster-General to investigate and adjust certain claims, which he did, and made up his decision or award thereon, and Congress repealed the act before the balance found due was paid, the court held that the proceeding was only a matter of accounting, and that the United States were not bound thereby as upon an award. In delivering the opinion of the court, M'r Justice Swayne says: "The adjustment having been made under a special law renders it in nowise different as regards the point we are considering from those made
19 daily by the accounting officers of the government, under the general law conferring their powers and prescribing their duties. The idea that the government is finally concluded by the result at which they may arrive would be regarded as a novelty within and without the several departments." (Chorpenning vs. United States, 94 U. S. R., 397, and 12 C't Cl. R., 119.)

The claimants' counsel relies upon the case of Kaufman vs. United

States (11 C't Cl. R., 659), recently affirmed, on appeal, by the Supreme Court (96 U. S. R., —), wherein it was held that an action might be maintained in this court upon an allowance made and certified by the Commissioner of Internal Revenue for the refund of a tax paid by a special tax stamp returned under the provisions of Revised Statutes, § 3426. But that was quite a different case from this. The Commissioner of Internal Revenue is not an accounting officer, and his allowance of a refund was made necessary by the statute and regulations before the claimant in that case had any cause of action upon which to found proceedings in this court. The original claim belonged to one of several classes of claims of like character, as to which the claimant's rights and the liability of the United States are not fixed until the discretion of some designated officer has been exercised thereon, and an allowance ordered by him. The rules of law applicable to our jurisdiction in such cases have been carefully considered and laid down by this court in former cases (Campbell vs. United States, 12 C't Cl. R., 470; Boughton vs. Same, 12 C't Cl. R., 330). Claims of that kind arise under numerous provisions of law, among which may be mentioned refunds of customs duties improperly collected, &c. (R. S. §§ 2984, 3011, 3014, Nichols' Case, 7 Wall., 122); drawbacks for duties and internal revenue taxes paid under various circumstances entitling parties to refund on the conditions specifically provided for (R. S., §§ 2977, 3015–3057, 3386, 3441; Portland Co. vs. United States, 5 C't Cl. R., 441; Campbell vs. United States, 12 C't Cl. R., 470); refunds of internal revenue taxes wrongfully assessed and collected or abated for different causes (R. S., §§ 3220, 3221, 3228), and claims for cotton seized after June 30, 1865, by agents of the government in violation of their instructions (act of May 18, 1872, 17 St., 134). In all these cases, and others of like kind, the officer charged by statute with the duty of allowing or disallowing the claim in his discretion or according to his judgment must first act before the claimant's right is fixed. Then, when he has obtained a decision in his favor, the claimant's demand, of which that decision is a prima facie if not conclusive determination, if the officer acts within the scope of his authority and in accordance with the provisions of law, may be the foundation of an action in this court, or may pass the accounting officers and be paid by dratts upon warrants duly issued, as in other cases.

Even the judgments of the Court of Claims must pass through the same processes of accounting, not for the purpose of review, but to justify the Treasurer in issuing his draft for the payment thereof; and that is what all the long process of accounting leads to, as we have before pointed out.

It remains to be considered whether or not the decisions of the accounting officers in favor of claimants, if not conclusive on the United States, are not at least prima-facie evidence of indebtedness, with the burden of proof on the defendants to impeach and overthrow the same. Most of the circumstances and reasons which we have recited as showing that such decisions are not conclusive on the court, also show that they are not even prima facie evidence.

The functions of this court are to hear and determine original claims and demands against the United States founded on contract, statute, or departmental regulations, and not upon the reports and action of accounting officers made for purposes altogether different from that of submission to any court. By Revised Statutes, section 1063, the head of any department may transmit any claim made upon it to the Court of Claims for determination, and it has been held

that this may be done after the accounting officers have certified a balance in favor of the claimant. (Delaware River and Steamboat Co. case, 5 C't Cl. R., 55; Winnisimmet and other cases, 12 C't Cl. R., 319.) It never could have been intended by Congress that in such cases the United States were to assume the burden of proof to establish the errors of their accounting officers, instead of requiring claimants to prove their whole case.

It is clear from all the provisions of law applicable to this court that claimants are required to establish their rights by original and legal evidence, exclusive of the testimony of parties in their own favor (R. S., 1079), and that they are not to rely upon reports and certificates of officers who pass upon claims without the formality of such evidence and proofs as are required in courts of justice, certificates made upon ex parte affidavits, often of claimants and interested parties, documents not proved under oath, and reports of other officers not sworn to, and other evidence satisfactory to them, and which under all the circumstances may be trustworthy to a greater or less extent, as is the unsworn and hearsay evidence on which most of the business of daily life outside of courts is conducted, but which would be wholly incompetent here.

The statements of accounts upon such evidence by accounting officers who have no other knowledge of the facts would be an unsatisfactory foundation on which to rest a prima-facie case against the United States, when parties come into court to set up and enforce their legal rights.

One of the primary, most important, and most useful objects to be attained in establishing this court was to provide a tribunal where claims against the government should be determined upon legal evidence, taken under the forms and subject to the rules of law, which they are not and never can be in the process of accounting in the Treasury Department, the machinery of which is only adapted to the passing upon ordinary accounts upon which controversies are not expected to arise to any great extent, and not at all beyond the means of adjusting from the records and files of the several departments.

By Revised Statutes, section 886, a transcript of the books and proceedings of the Treasury Department is made evidence "when suit is brought in any case of delinquency of a revenue officer or other person accountable for public money," and certified copies are authorized to be received instead of compelling the government to produce original documents in certain cases. And by Revised Statutes, sections 951 and 952, in suits by the United States against individuals, "no claim for a credit shall be admitted upon trial except such as appear to have been presented to the accounting officers of the Treasury for their examination, and to have been by them disallowed in whole or in part," with an exception therein specified but not here material. Those provisions relate to actions brought by the United States, and are rules of evidence established for the convenience of the government as exceptions in its favor to the general rules of law, and are not applicable to proceedings in this court in favor of claimants.

There is a reason why a transcript of the records and proceedings of the Treasury Department may justly and properly be made evidence by Congress in favor of the United States, "in any case of delinquency of a revenue officer, or other person accountable for public money,"
21 to which this provision is limited, which does not apply in cases brought by claimants to establish their demands. In the former case the items and charges to be proved thereby are payments and advances made through the departments by public officers, whose duty it

is to enter the same of record. They are official recorded acts authenticated, as other records are, by certified copies. In the latter case, the items which claimants set up as demands against the government are not generally matters of record, nor within the knowledge of the Treasury officials, and whatever vouchers appear among the papers in the course of the proceedings for accounting are usually furnished by the claimants; and the filing of them in the department, and then obtaining a transcript of the same, if such transcript were admitted in evidence, would be to claimants an easy method of making evidence for themselves.

Even when offered in favor of the United States, a transcript from the Treasury Department is not evidence of all it may contain. In United States vs. Bufort (3 Pet., 12), the Supreme Court says, "an account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by the books." In several subsequent cases this statement is cited by the court with approval.

We do not mean to hold that a copy of a voucher sent here officially through the department in which it belongs, and where the original is recognized as genuine and valid, would not be prima facie evidence of indebtedness, independently of the action of the accounting officers; but only that accounts and balances stated by those officers, involving controverted questions of law, as well as of fact, depending upon the genuineness, validity, and legal effect of documents, as the assignment of the voucher in this case, which are not matters of public record, nor within the knowledge of officers of the department in which they are filed, and are accepted upon evidence which would not be admitted in any court of justice, are not prima facie evidence to charge the United States in suits against the government.

The Court of Claims at first had a rule that "in every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon"; and a petition was dismissed because it did not set forth those facts. On appeal, the Supreme Court decided the rule to be unauthorized and void, and remitted the case with directions to proceed to a hearing on the petition, and the rule was thereupon abrogated, and this court has ever since proceeded to hear cases without reference to the action of accounting officers thereon (Clyde vs. United States, 13 Wall., 35).

If, however, it is the duty of the Court of Claims to revise the certificates of the accounting officers as prima facie evidence in favor of the claimants, and to confine itself to a review of the case upon the papers submitted through those public officers, we find in this case two insurmountable obstacles in way of a recovery by the claimants.

1. The original cause of action first accrued in May, 1861, and the petition was not filed until July, 1877, more than six years after the cause of action first accrued, and so is expressly barred by statute (R. S., § 1069), unless the allowance by the accounting officers created a new cause of action, which we have shown was not the legal effect thereof.

22 2. The present claimants are assignees, or claim to be assignees, of the original creditor of the United States, by virtue of a voluntary assignment made before "the allowance of the claim, the ascer-

tainment of the amount due, and the issuing of the warrant for the payment thereof." It has recently been authoritatively determined by the Supreme Court that such an assignment is in direct contravention of the act of 1853, ch. 81 (now R. S., § 3477), and gives to the assignee no right of action against the United States. Neither the accounting officers nor the Secretary of the Treasury, nor both together, can create a privity of contract between the government and an assignee of its creditor, by recognizing a voluntary assignment made before the warrant for payment is drawn, and by stating an account thereon in favor of the assignee (Gillis's case, 95 U. S. R., 407; Burke's case, 13 Ct. Cl. R.; Johnson's case, 13 Ct. Cl. R., —).

So, in any point of view which we consider this case, it is clear that the claimants have no legal cause of action upon the facts which have been proved.

This brings us to the question of whether or not the defendants are entitled to judgment against the claimants for the $21,675.68 thus paid to them as assignees, by virtue of an assignment made before warrant issued. The Assistant Attorney-General has filed a set-off or counter-claim (R. S., §§ 1059, 1061) for that amount, on the grounds that payment was illegally and improperly made by the public officers, and so may be recovered back.

In our opinion, this position cannot be successfully maintained. It by no means follows that payments made with the consent of the parties interested, upon assignments which could not be enforced in law, are such illegal and unwarranted payments by public officers that the United States may recover back the money, especially when the settlement is not objected to, but is acquiesced in by the original creditor, and it does not appear that the government has suffered or can suffer any loss thereby.

If parties allow money due them to be paid to others with their knowledge and consent, it is an adoption and ratification of the act which they cannot afterwards set aside, and such payment is a valid discharge of the debt as between the government and the creditor. There is no reason, therefore, why the United States should recover back what has thus been paid in good faith and to the satisfaction of all parties interested, when there is no other claimant for the money, which, if recovered, the government ought not to retain.

On the whole case, the judgment of the court is that both claimants' petition and the defendants' counter-claim be dismissed.

23 VIII. *Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington on the 29th day of April, A. D. 1878, judgment was ordered to be entered in said cause as follows:

The court on due consideration of the premises find upon the petition of the claimants for the defendants, and do order, adjudge, and decree that the claimants' petition be dismissed, and upon counter-claim of the defendants the court find for the claimants, and do order, adjudge, and decree that the counter-claim of the defendants be dismissed.

24 IX. *Application of claimants for and allowance of an appeal.*

And now come the said plaintiffs and appeal to the Supreme Court of

the United States from the judgment against them rendered in the above-entitled cause.

ENOCH TOTTEN,
Att'y for Plaintiffs.

Filed May 15, 1878.

And now, to wit, May 15, 1878, it is ordered that the appeal be allowed as prayed for.

25 X. *Application of defendants for appeal, and order allowing same.*

From the judgment rendered in the above-entitled cause on the 29th day of April, 1878, in favor of claimant, the defendants, by their attorney-general, on the 17th day of May, 1878, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Attorney-General.

Filed May 17, 1878.

And now, to wit, June 11, 1878, it is ordered that the appeal be allowed as prayed for.

26 In the Court of Claims.

WILLIAM S. MCKNIGHT AND JAMES W. Richardson
vs.
THE UNITED STATES.
} No. 11717.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the judgment of the court; of the application of the claimants for the allowance of an appeal to the Supreme Court of the United States and of the order allowing same; of the application of the defendants for the allowance of an appeal, and of the order of the court allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 24th day of June, 1878.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Endorsement on cover:) No. 707. William S. McKnight & James W. Richardson, appellants, vs. The United States, and No. 708, The United States, appellants, vs. William S. McKnight & James W. Richardson. Court of Claims. Filed 1st June, 1878.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1878.

WILLIAM S. McKNIGHT et al.
vs.
THE UNITED STATES.

Nos. 707, 708.

BRIEF FOR CLAIMANTS.

Cross appeal from a judgment of the Court of Claims.

On the 13th day of May, 1861, a voucher in the ordinary form was made and issued by John B. Grayson, Lt. Col. and Commissary of Subsistance, U. S. A., in favor of one Simeon Hart, for the sum of $30,778.18 (6.) It was so issued on account of flour furnished to the army of the United States, at Albuquerque and Fort Stanton, New Mexico, under various contracts with the United States. (4.)

A blank receipt (7) was appended to the voucher, and this was signed by said Hart, and the voucher was then by him delivered to the plaintiffs. The plaintiffs afterwards presented it to the proper department for payment, and, after great delay, the amount was settled between the United States and the plaintiffs by the proper accounting officers of the Treasury, and a balance of $30,675.68 was

stated in favor of the claimants as assignees of Simeon Hart, and was by the Second Comptroller certified to the Secretary of War for payment on the 6th day of January, 1873. The case was, during the investigations, referred to the Judge Advocate General of the Army, and also to the Attorney General of the United States, and both of these officers rendered opinions in favor of the allowance of the claim to the claimants. The opinion of the Judge Advocate General was also approved by the Secretary of War.

Upon this certificate of the comptroller, the Secretary of War drew his requisition upon the Secretary of the Treasury, requesting that a warrant might be issued in favor of the plaintiffs for the amount of the balance so certified, which requisition bears date January 7th, 1873, and was drawn against the appropriation for "subsistance of the Army prior to July 1, 1870."

At the foot of this requisition of the Secretary of War was written the following note, to wit: "Of this amount the sum of nine thousand dollars ($9,000) will be paid to the Treasurer of the United States, to be by him deposited in the Treasury on 'general account,' on account of a debt due the United States by Simeon Hart, as security on a bond given by Lieut. Col. John B. Grayson, Com'y of Subs., to await the final adjustment and decision of Grayson's accounts.

"J. M. BROADHEAD,
"*Comptroller.*"

This note bears no date.

On the 31st day of January, 1873, the Assistant Secretary of the Treasury issued a warrant in pursuance of this requisition of the Secretary of War, by which he ordered and directed the Treasurer of the United States to pay to the plaintiffs the sum of $30,675.68, and to charge the same to the appropriation specified by the Secretary of War.

Upon this warrant the Secretary of the Treasury afterwards endorsed the same directions as those contained in the note appended by the Second Comptroller to the requisition of the Secretary of War; this direction, like the note of the comptroller, bears no date.

In pretended payment of the requisition of the Secretary of War, and in obedience to the said directions of the head of the Treasury Department, the Treasurer of the United States made two drafts, dated on the 31st day of January, 1873, one of which was for the sum of $21,675.68, and was payable to the plaintiffs or order, and the other was for $9,000, and was payable to the Treasurer of the United States. The first of these drafts was paid to the claimants, and the amount of the second was paid into the Treasury. To recover this amount this action was instituted.

Errors.

1. The Court of Claims erred in holding that the settlement of the Second Comptroller was not conclusive upon the executive branch of the Government.

2. It also erred in holding that the claimants could not maintain an action in the Court of Claims on the account, as stated by said comptroller, and as ratified and confirmed by the executive departments.

Points and Authorities.

By virtue of the settlement of the accounts between the parties, the statement of the balance due the plaintiffs, the subsequent certifying of that balance to the Secretary of War and his requisition upon the Secretary of the Treasury, the plaintiffs became entitled, by law, to the sum of money thus found and declared to be due them. And an implied promise arose which binds the United States to pay that amount. The note added to the requisition of the

Secretary of War by the comptroller, and the endorsement put upon the warrant issued by the assistant Secretary of the Treasury, by the Secretary of the Treasury, were alike transgressions of the law made for the government of the treasury, and in violation of the legal rights of the plaintiffs. The Secretary of the Treasury was wholly without jurisdiction in the matter except to grant his warrant for the money to issue upon the requisition of the Secretary of War. The appropriation upon which the requisition was drawn was under the control of the War Department, and not of the Treasury Department. The subsequent action of the comptroller and of the Secretary of the Treasury was a clear usurpation of power.

The statutes regulating, prescribing, and limiting the disbursements of appropriations by the Treasury Department are stated below so far as they are deemed material.

The act of March 3, 1817, (3 Stat. 368,) declares that it shall be the duty of the Second Comptroller, (1) "to examine all accounts settled by the second, third, and fourth Auditors and certify the balances arising thereon, to the Secretary of the department in which the expenditure has been incurred;" and (2) "to countersign all warrants drawn by the Secretaries of War and of the Navy, which shall be warranted by law." (R. S., § 273.)

The act of May 7, 1822, (3 Stat. 689,) provides that "all moneys appropriated for the use of the War and Navy Departments from and after the day and year last aforesaid, *shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those departments*, respectively, countersigned by the second comptroller of the treasury, and registered by the proper auditor." (R. S., § 3673.)

The second section of the act of September 2, 1789, (1 Stat., 65,) provides that the Secretary of the Treasury

"*shall grant*, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the treasury in pursuance of appropriations by law." (R. S., § 248.)

By the second section of the act of March 3, 1817, (3 Stat., 366,) it is provided, that all "claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Treasury Department."

The act of the 30th March, 1868, (15 Stat., 54,) as now written in the Revised Statutes (§ 191) is as follows: "The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be *conclusive* upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may, however, submit to such comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive, as hereinbefore provided." See 1 Opinions; 13 Opinions; 14 Opinions Attorneys General; and *Delaware Co.* vs. *U. S.*, 5 C. C., 55.

The appropriation upon which the requisition of the Secretary of War was drawn, was under the exclusive control of the head of the War Department (*Delaware Co.* vs. *U. S.*, 5 C. C., 55), and the requisition amounted to a special appropriation to the plaintiffs of so much of the fund; it was equivalent to an equitable assignment to the plaintiffs.

On the subject of equitable assignments, see *Ryall* vs. *Rowles*, 2 Leading Cases in Eq., pt. 2 (1,533), p. 1,641, Ed. of 1877; *Manderille* vs. *Welch*, 5 Wheat., 277.

In Fant's case (14 Opinions, 412), the accounting officer treated Fant as the owner of the claim so far as to deduct from a subsequent claim of which he was the assignee, the amount of an over-payment to him in the settlement of a former claim, by him held also as assignee, notwithstanding the fact that he derived his title to the two claims from different persons. And the Attorney General approved the action.

The action of the parties by which this account was stated and settled according to law, gave the plaintiffs a right of action. When an account has been voluntarily stated between parties, an action of assumpsit may be maintained thereon. (Bullers, N. P. 128; 3 Black. Com., 162; 2 Greenlf. Ev., § 34.) It was the duty of the comptroller to state this account; the Secretary of War was authorized to confirm the account, by drawing his requisition to pay it out of the proper appropriation; and the account is not disputed by any of the parties.

This case is not distinguishable in principle from the case of *Kaufman* vs. *The United States*, 96 United States, 407. There the statute authorized the Commissioners of Internal Revenue to make allowance, on proper evidence, for unused or mutilated stamps, &c., by giving other stamps in lieu of them or by paying for them. A regulation to this effect was established by the commissioners, but it will be noted that no officer was specially designated to examine such cases or make such allowances. The commissioner examined the claims of Kaufman, and allowed him the small sum of money, to recover which that action was brought in the Court of Claims. This court held that such allowance by the commissioner "raised an implied promise on the part of the United States to pay" the

amount found to be due; and the court also held that the account as stated was binding until impeached, and that the affirmative of the impeachment rested upon the Government.

In this case there was an appropriation made to pay vouchers of the kind in question, and it was by law made the duty of the comptroller to examine and state this account, and his settlement, it is decisively declared, shall be "conclusive upon the executive branch of the Government." And it was treated as conclusive by the Secretary of War, who honored it by drawing his requisition to pay the account out of the appropriation for supplies in his department. It was also ratified by the Secretary of the Treasury, who issued his warrant in obedience to the statute (R. S., § 3673), which directs that all appropriations for the use of the War and Navy Departments "shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor."

It seems plain that the action of the comptroller in this case was as potent as that of the Commissioner of Internal Revenue in the Kaufman case. The comptroller was exercising his official functions under the authority of the statute law, and that law declares that his action shall be conclusive, and the allowance of the amount through this statutory regulation should be "equivalent to an account stated between private parties, which is good until impeached for fraud or mistake." (Kaufman Case.)

The Court of Claims, in its opinion, seeks to distinguish the present case from the Kaufman case, and says: "The Commissioner of Internal Revenue is not an *accounting officer*, and his allowance of a refund was made necessary by the statute and regulations before the claimant in that case had any cause of action upon which to found proceed-

ings in this court." (14.) It may be true, in a general sense, that the Commissioner of Internal Revenue is not an "accounting officer," but it will hardly be denied that he was an accounting officer when he was stating the account between Kaufman and the United States. The other reasons given in the extract from the opinion apply with precisely the same force to the present case as to the Kaufman case. Without the settlement made by the accounting officer, and the ratification thereof by the executive officers, the present claimants could have had no standing in that court. It is not pretended that at this late day, even if at any other time, they could have maintained an action, *in their own names*, on the voucher assigned to them by Hart. (See *Gillis* vs. *The United States*, 95 U. S., 407.)

The extraordinary character of the transactions of the Treasury officers in this case will be more apparent by a little further examination. It will not be overlooked that this requisition is dated January 7, 1873, (erroneously *printed* January 31, 1873,) and is countersigned by both the auditor and comptroller on the same day. The warrant of the Secretary of the Treasury was not drawn until January 31, 1873, and sometime between these two dates (when, we do not know), the mischievous note was put upon the requisition of the War Department by the comptroller. It will be difficult to show that the comptroller was not wholly without authority to make such a direction. The Secretary of the Treasury was without authority also. It will be remembered that there was no dispute as to the correctness of the account as stated by the comptroller—there was no suggestion of fraud or mistake. The money had been drawn out of his appropriation by the Secretary of War to pay an account appertaining to his department, properly adjusted and certified to him, and it was the duty of the Secretary of the Treasury to pay upon that account. He possessed no more authority to pay

a part of the amount of that appropriation to the Treasurer of the United States, than he had to pay it to the cashier of a national bank or to any other stranger. If the Secretary of the Treasury can lawfully exercise such a power as was exercised in this case, then there is no force in the law and there is no safety for the creditors of the Government. No head of an executive department, except the Secretary of the Treasury, can exercise any control over the appropriations provided for his department, and all the appropriations may be diverted from their appropriate purposes by the Secretary of the Treasury and be turned into the hands of the Treasurer to swell the "general fund." It is asserted in the opinion of the court below (12) that the note, written upon the requisition of the Secretary of War by the comptroller, "was a part of his official action in the matter." It is not quite clear what this language means; but if it was intended to assert that the act of writing this direction on that requisition was a part of the comptroller's official action in stating the account, it needs no argument to show the error. The comptroller had authority, probably, to correct or alter the balance previously ascertained and declared by him, had an error been pointed out, but he possessed no power to say that the balance found and declared to be due to one man should be paid to another. Was it any part of his lawful duty, or "official action," to mutilate the requisition of the head of the War Department by such a writing, and thereby take from one of the appropriations of that department a large part of the public money drawn to pay a just obligation of the Government, and turn it into another fund under the exclusive control of the head of the Treasury Department?

The diversion of this fund by the action of these two executive officers, was not only a direct violation of law, but it was wholly unreasonable and unwarranted by the facts. By this endorsement of the head of the Treasury Department, the Treasurer of the United States was directed

to deposit this money, declared to be due to the claimants, to the credit of a "general account," whatever that may be, because of a debt due the United States from Simeon Hart, as surety on a bond given by Col. Grayson, commissary of subsistence, the deposit "*to await final adjustment and decision of Grayson's accounts.*" From this it appears that there was then no debt due to the United States from Hart, but only a contingent liability on the official bond of an officer of the army. This voucher was issued in May, 1861, and this endorsement was written between the 7th and 31st days of January, 1873, nearly twelve years afterwards. If the contingency had happened which rendered Hart liable for any sum on the official bond, that fact certainly should have been ascertained by the public officer within twelve years; these accounting officers should not have been compelled, after the lapse of so long a period, "to await the final adjustment and decision of Grayson's accounts." In addition to this, there was no law authorizing such an extraordinary proceeding, even if Grayson had turned out to be a defaulter, until after the liability of the security had been ascertained and declared by the courts or by some other properly constituted tribunal. Upon such a rule no man who had once signed an official bond of a public officer could safely transact any business with the Government afterwards.

The defendant in the court below set up a counter-claim by which it is sought to recover from these claimants the amount of money which was actually paid to them on the settlement made by the comptroller. The ground of this demand is, that all assignments or transfers of claims against the United States are prohibited by statute, (Act of February, 1853, 10 Stat., 170,) and are, therefore, absolutely void; that for this reason the sum of $21,675.68 was unlawfully allowed and paid to the claimants, and, therefore, may be recovered in this action.

The subject of the assignment of claims against the United States has recently undergone much discussion both in the courts and in the executive departments.

In the case of *Gillis* vs. *The United States* (95 U. S., 407), this court decided that the assignment of a claim for the proceeds of captured and abandoned property, carried with it no authority to the assignee to maintain an action for such proceeds, in the Court of Claims, in his own name. Although the court, in its opinion in that case, seems to incline to the view that all claims are unassignable, still the only point which really was decided was as above stated. It seems to me that there are many claims against the Government which are assignable, notwithstanding the emphatic language of the statute. This court has, in several cases, at least indirectly sanctioned the doctrine of the assignability of claims against the United States.

In the case of *Burns* vs. *The United States* (12 Wall., 253), there was an assignment of a contract together with the benefits thereof, and it was upheld and a heavy judgment was awarded in the case. Burns was an assignee and sued in his own name.

In the case of *Pierce* vs. *U. S.* (7, Wall., 666), this Court declared that when the United States became a party to commercial paper they were bound by the same principles which govern individuals in their relations to such paper. Now it will be difficult to deny that a bill of exchange, issued by the United States, in the hands of an endorsee, is a claim against the United States. An over-due bill of exchange is certainly a legal claim against an individual drawer. If a bill of exchange overdue is a claim, then the doctrine above stated cannot be correct if the statute in question prohibits the transfer of "*every claim* against the United States, however arising, of whatever nature it may be, and wherever and whenever presented." See *United*

States vs. *The Bank of the Metropolis* (15 Peters, 377); *Anderson* vs. *The United States* (9 Wall., 67); *Lawrence* vs. *The United States* (8 Court of Claims, 252; see also 3d C. C., 71).

Soon after the act of 1853 became a law, the question arose as to its proper interpretation for practical application in the executive departments of the Government in the transaction of its varied and extensive business throughout the country, and the matter was submitted to the First Comptroller of the Treasury, who was an able lawyer and a careful and experienced accounting officer. His conclusions were embodied in a letter of instructions, dated May 2, 1853, and I take the liberty of transcribing here those parts of the paper relating to the subject-matter now being discussed. The rules then prescribed have, as I believe, been followed in the Treasury Department for a quarter of a century.

The Comptroller says:

"A claim is defined in Jacob's Law Dictionary, title Claim, as follows: 'Claim, a challenge of interest in anything that is in the possession of another, or at least out of a man's own possession—as claim by charter, by descent, &c. In Plowden's Com., 359, Dyer, C. J., is said to have defined claim to be a challenge of the ownership of property that one hath not in possession, but which is detained from him by wrong.'

"The same definition substantially is given in Tomlin's Law Dictionary, and in Bouvier's Law Dictionary, title Claim.

"The word claim has been sometimes used in a vague manner as including all personal demands; but the most general sense in which it is used, and the one that is most accurate, limits it to demands that are disputed or uncertain in their nature. A debt admitted to be due, or evidence by a judgment, bond, promissory note, bill of exchange, or other instrument in writing, the execution and validity of which is not disputed, is of a higher nature than a mere claim. Uncertain damages arising from a tort, or from the violation of a contract, constitute a claim, not a

debt. The rights of American citizens to compensation for injuries received from the French Government prior to the treaty for the purchase of Louisiana, are usually spoken of as French claims. So also the claims of American citizens for injuries received from the Government of Mexico prior to the late war, which were adjudicated by commissioners, were properly called claims, and had not the certainty and essential character of debts. The claims of citizens to be indemnified for depredations committed upon them by Indians, are properly called claims, and could not with propriety be called debts. So pensions and bounties subsequently granted to persons who have served in war, though founded on equitable considerations, yet they did not constitute legal debts, and the right to the pension or bounty granted is but a claim, and not a debt.

"A salary account is not, strictly and correctly speaking, a claim; it is a demand of a higher nature, and of a more definite and certain character than a mere claim; it constitutes a debt. So also an account for any other services rendered under a contract made in pursuance of law, constitutes a debt, and not a mere claim. So also an account for materials, provisions, and supplies of any kind, furnished for any of the departments of the Government in pursuance of a contract legally made, constitutes a debt of a higher nature than a mere claim. But if the party claims an extra allowance beyond what the law or the terms of the contract give him, founded on equitable considerations, such as the difficulty of the service, the alleged hardness of the contract, and the insufficiency of the compensation, the amount claimed as an extra allowance is properly a claim, and not a debt. If a dispute arises in relation to the commencement or termination of a salary, the annual amount of which is fixed by law, and the accounting officers disallow a portion of the demand, the amount so disallowed becomes a mere claim. So in relation to other accounts; when the accounting officers act upon an account, disallow some of the items as illegal or overcharged, and allow the remainder, the items so disallowed lose the character of a debt, and become a mere claim.

"The dividing line between debts and mere claims is observed with tolerable accuracy in prescribing the duties of committees in Congress. It is the business of the Committee of Ways and Means to bring in bills to provide for the payment of all debts due from the United States, as well as

for the ordinary current expenses of the Government, and to pay all such claims as have been recognized by law; that committee has nothing to do with claims which the laws do not recognize as legal and existing. On the contrary, claims for uncertain damages, for extra compensations, for pensions, and for depredations, trespasses, and injuries, are usually referred to the Committee on Claims, and other committees designated by the rules, to examine, report upon, and bring in bills for the payment of such sums as the appropriate committe may deem just.

"It has been customary for salary officers, contractors, and other creditors of the United States, to draw orders or drafts on the government, which they negotiate, and thus realize the amount due them before the accounts are passed. This is often a great convenience to persons living at a distance, on the Pacific coast, or anywhere west of the Mississippi. Salaries are paid quarterly, but the account for a quarter cannot be passed until after the end of the quarter. Heretofore, drafts have been frequently drawn for a quarter's salary, or for a portion of it, and sent here before the end of the quarter; and when so received the account has been passed, and the warrant issued to the owner of the draft as the assignee of the salary. If the statute of February last should be applied to salary accounts, no such drafts could be drawn until after the end of the quarter, after the account was passed, and a warrant on the Treasurer issued for the payment thereof. The result would be, that many officers would be compelled to wait from 30 to 60 days after the end of each quarter in order to receive warrants on the Treasurer, or the Treasurer's drafts, before they realize any portion of their salary; and the delay and inconvenience to many contractors, and creditors, and employés of the government, would be still greater. I do not believe that Congress intended that the statute should be applied to any such cases.

"What was the evil for which the remedy was designed? A reference to the terms of those statutes, and the practice of agents in prosecuting claims before Congress, indicate the evil, and the object of the remedy. Agents were in the habit of getting general powers of attorney, to prosecute before Congress or the Departments uncertain and doubtful claims, and to obtain and receive the amount which might be allowed upon them; and in many instances assignments were obtained of large claims for very small sums

from persons not knowing their rights. In such cases, unsuspecting persons were put into the hands and power of sharp and cunning agents, and shrewd unscrupulous speculators; the claimant often had no means of protecting himself against the false representations and deceptions of agents and purchasers, and the agent might misrepresent the amount collected. Hence the requirement that the power-of-attorney, draft, assignment, or transfer, should refer to the statute under which the claim is allowed, and that the amount due should be ascertained, and a warrant issued for the same, before any such power-of-attorney, draft, transfer, or assignment, can be legally made. It is obvious that this is required by the statute in order that the claimant may fully understand the extent of his rights, and the amount allowed to him, before he can legally assign or transfer the same, or authorize any other person to receive the amount. But no such precaution is necessary in relation to salary accounts, accounts for services rendered, or supplies furnished, or for any other form of debt, about the amount of which there has never been any dispute. The officer or creditor in all such cases knows the precise amount, or very nearly the amount, due him; and no good can arise, but often very great inconvenience and evil, from imposing on him restrictions in relation to the time and mode of transferring and assigning the same, or of making powers-of-attorney for the receipt thereof."

There is no doubt that ever since the act of 1853 the business of the departments has been conducted upon the principles declared in this document. This being a contemporaneous and authoritative construction of the law, it is entitled to great weight. The law-making power must have been content with the construction, otherwise there would have been another statute amendatory or declaratory; but none can be found. The Revised Statutes preserves the law in the same language, thus indicating approval of interpretation of the Executive Department. The settlement of the accounting officer in this case was made in pursuance of the established rule. It is difficult to conceive how the business of the Government, particu-

larly of those branches appertaining to the army, can be carried on if the merchant furnishing supplies cannot lawfully procure his vouchers to be discounted.

The voucher assigned in this case was "an account for * * provisions * * * furnished to a department of the Government" in pursuance of contracts legally made, and therefore "constituted a debt of a higher nature than a mere claim."

This was a liquidated account. The prices for the supplies are fixed by the contracts under which they were delivered (7), and the quantity was ascertained and delivered by the public officer charged with that duty. The property was all accounted for "by the receipts of officers duly qualified to receive it" (7). All these facts appear from the voucher itself, and its correctness is not disputed. It is just as much a liquidated demand as could be a bill of exchange drawn or accepted by an officer of the Government duly authorized so to do.

In conclusion, I submit that the proper construction to put upon the act of February, 1853, is indicated by its title — "An Act to Prevent Frauds upon the Treasury of the United States;" that it was not the intention of the legislative power to interfere with and cripple the transaction of the ordinary business of the executive departments, nor to eliminate all Government business from the elements of commercial intercourse between citizens of the United States.

The judgment of the Court of Claims upon the petition of the claimants ought to be reversed, and a judgment rendered in favor of the petitioners for $9,000.

ENOCH TOTTEN,
Attorney for Claimants.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WM. S. McKNIGHT ET AL.
vs.
THE UNITED STATES. } Nos. 707, 708.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WM. S. McKNIGHT ET AL.
vs.
THE UNITED STATES.
} Nos. 707, 708.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In May, 1861, Lieut. Col. John B. Grayson, as commissary of subsistence, is said to have given to one Simeon Hart, a contractor for Army supplies, a voucher for flour asserted to have been previously delivered. There was no other proof of the delivery of the flour offered to the Court of Claims beside this voucher; of the genuineness of which, or of the below-named indorsement and assignment thereof, no proof was offered. The voucher was for $30,778.18. It was presented at the Treasury Department and passed by the accounting officers at $30,675.68. The blank undated receipt at the bottom of the voucher purported to be signed by "S. Hart." His signature was not proved, nor was that of Colonel Grayson.

January 6, 1873, the Second Comptroller certified to

the Secretary of War that this balance arose upon said account, as settled by the Third Auditor, and was due to Messrs. McKnight & Richardson as assignees of S. Hart. Accordingly on the last day of that month Secretary Belknap issued his requisition upon the Treasury for the payment of that sum to these gentlemen, as such assignees, which requisition was countersigned by the Second Comptroller and registered by the Third Auditor; but the Comptroller directed that $9,000 of the amount be paid to the Treasurer of the United States on account of a debt due the United States by Simeon Hart as surety upon a bond of Col. John B. Grayson. The warrant, drawn in accordance with this settlement, issued January 31, 1873, and a draft for the $21,675.68 was delivered to claimant's attorney, the other $9,000 going into the Treasury, as above directed. (Record, 3 to 7.)

The present suit is to recover the $9,000 so withheld. The government filed an account in set-off and counter-claim to recover the $21,675.68, alleging that it was improperly and illegally paid from the Treasury to the claimants. (Record, 3, middle.)

There was no assignment or power to collect the claim given by Hart after the warrant aforesaid issued thereon. (Record 7, P. vii.)

The court dismissed the petition, disallowing the set-off and counter-claim.

ASSIGNMENT OF ERRORS.

The Court of Claims erred in not awarding judgment in favor of the United States for the $21,675.68 mentioned in the set-off and counter-claim.

STATUTES.

The learned judge who delivered the opinion of the Court of Claims entered into a careful and interesting examination of the statutory provisions relative to the adjustment of claims in favor of and against the United States. No more specific production of those statutes is required, except, perhaps, the language of those sections which relate to the auditing and certification of accounts relating to the subsistence of the Army. By R. S., sec. 277, item 3, these are examined by the Third Auditor, who then certifies the balances and transmits the accounts with the vouchers and papers to the Second Comptroller "for his decision thereon."

R. S., "SEC. 273. It shall be the duty of the Second Comptroller,

"First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balance arising thereon to the Secretary of the department in which the expenditure has been incurred.

"Second. To countersign all warrants drawn by the Secretaries of War and of the Navy, *which shall be warranted by law.*" * * *

R. S., "SEC. 3673. *All* moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor."

What are termed "requisitions" in this section are called "warrants" in sec. 273.

R. S., "SEC. 191. The balances which may from time

to time be stated by the Auditor and certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the *executive* branch of the government, and *be subject to revision* only *by Congress or the proper courts.* The head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, *as hereinbefore provided.*"

The act of February 26, 1853 (10 Stats., 170), re-enacted in R. S., sec. 3477, provides that "ALL *transfers and assignments made of any claim upon the United States,* or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of the same, *shall be* ABSOLUTELY NULL AND VOID, unless they are freely made and executed in the presence of at least two attesting witnesses, AFTER the allowance of such a claim, the ascertainment of the amount due, *and the issuing of a warrant for the payment thereof.*" * * * The section then goes on to require an assignment to recite the warrant, be acknowledged, and to bear a certificate of the magistrate that it was fully explained to the assignor.

ARGUMENT.

I.

The unanimous decision of this court, construing the act of February 26, 1853, §§ 1 and 7 (10 Stats., 170, 171; R. S., sec. 3477), prohibiting the assignment of all claims against the United States, and declaring them "absolutely null and void," has been so recently given, in an opinion so carefully prepared, satisfactory, and unanswerable, after full argument on both sides, and leading to the reversal of a judgment concurred in by all the judges of the court below, that it would be attributing too overwhelming an influence to the suggestions found in the brief of my learned opponent to assume that the doctrine of Gillis's case (95 U. S., 407) will now be overturned, or even questioned. Indeed, it has just been affirmed in Erwin's case, No. 701 of current term.

We shall assume, then, on the contrary, that the assignment by Simeon Hart to the appellants was "absolutely null and void." The sole contention made in the above-named case by Gillis's counsel was that the act only applied to the Treasury Department; in the present instance, it was precisely there that effect was sought to be given to the assignment, despite the statute.

If Hart's assignment was "absolutely null and void," then there never were any accounts to be settled between the parties to this suit (Appellant's Brief, 3, bottom), and the Second Comptroller and other accounting officers never acquired any jurisdiction over the subject-matter, or to state any balance *as due the claimants*. The appellants' proposition, that the mere act of an ex-

ecutive officer, in defiance of the clearest provisions of law, which violation is declared at every step of the procedure, upon the face of every paper and indorsement, can create any implication of a promise, or any claim, legal or equitable, upon the government whose laws have been set at naught, is hardly worth discussion. (Knote *v.* United States, 95 U. S., 156, 157, close of opinion.)

Nor do I believe any investigation of the subject of equitable assignments becomes necessary. That an officer and a citizen, alike bound to know and obey the law, can deliberately violate it, and then claim to make the transaction effectual by calling it an equitable transfer, is so subversive of all my ideas of the duty and province of courts of equity that I find myself unequal to the debate. I will refer to the same edition of 2 Leading Cases in Equity, which he cites, pp. 1599 *et seq.*

There is no relief in equity against a statute. Sedgwick on Stat. and Const. Law (second ed., by Pomeroy), 83.

There is this to be said, however: if the claimants have any rights in equity, the Court of Claims had no jurisdiction over that kind of claim; it does not administer equitable relief. "And certainly the holder of a mere equitable right can have no standing as a plaintiff in the Court of Claims; * * * the Court of Claims is without power to adjudicate upon merely equitable rights." (United States *v.* Gillis, 95 U. S., 412, citing Bonner *v.* United States, 9 Wall., 156.)

Counsel are mistaken in saying "this account was stated and settled *according to law*." (Brief, 6.)

The truth is there never was any account stated with McKnight & Richardson; the account was with Simeon Hart, contractor. All the Comptroller had to state

was the amount of the balance of that account; but he wrongfully certified that balance to be due to Hart's assignees.

There can be no *implied* promise where the law excludes the idea of an express one, nor against the constant protest of the party against whom the implication is sought to be raised. (95 U. S., 156, 157.)

It is only the statement of the *balance* that is conclusive upon the head of the department; that officer is not then obliged to pay it, but withholds it if satisfied nothing is due; thus only can it be brought before the court for revision, without a suit is brought to recover the money after it is paid out.

Kaufman's case does not touch the vital point in this.

More than enough has been said as to the $9,000 which McKnight & Richardson filed this petition to obtain, through an assignment absolutely null and void.

II.

The second question is as to the right of the United States to recover the $21,675.68 paid to claimants, by virtue solely of an assignment "absolutely null and void" in law.

The Court of Claims denied the right. The reasons for that denial are stated in the two concluding paragraphs of its opinion (Record, 17), which are as follows:

"In our opinion this position cannot be successfully maintained. It by no means follows that *payments made with the consent of the parties interested*, upon assignments which could not be enforced in law, are such illegal and unwarranted payments by public officers that the United States may recover back the money, espe-

cially when the settlement is not objected to, but is acquiesced in by the original creditor; and *it does not appear that the government has suffered, or can suffer, any loss* thereby.

"*If parties allow money due them to be paid to others* with their knowledge and *consent* it is an *adoption and ratification* of the act, which they cannot afterward set aside, and such payment is a valid discharge of the debt as between the government and the creditor.

"There is no reason, therefore, why the United States should recover back what has thus been paid in *good faith*, and *to the satisfaction of all parties interested*, when there is no other claimant for the money which, if recovered, *the government ought not to retain*." (Record, 17.)

Judgment was rendered in conformity with this opinion, and presumptively upon the grounds thus stated. To show the fallacy of the reasoning, let us analyze it. The first assumption is that the "payments were made *with the consent of the parties* interested." Who were these parties? What their relations, and the nature of the payments? The liability of the government to make *any* payment arose out of a contract for flour to be delivered to the United States by Simeon Hart. These, then, were "the parties interested" by law in the question of payment. Assume, if you please, that Hart assented to the payment of this money to McKnight & Richardson—a fact, however, which is nowhere stated in the findings, but it is there explicitly declared that *no proof was offered of the genuineness of his signature*, which is the sole basis of the so-called assignment or assent—did the United States consent? If so, when, where, and how? Speaking through what authorized channel? *If Hart's signature were known to be genuine, there is no indication in the docu-*

ment of a purpose to assign. (Record, 6, 7; additional finding vi.)

Congress certainly never consented to such a payment to an assignee, nor conferred authority upon any or all the officials in the War and Treasury buildings to give such consent in behalf of the government; on the contrary, it expressly forbade any such transaction. Instead, then, of having "the consent of the parties," you have the emphatic dissent of one party (the United States), and not a scintilla of proof of the assent of the other (the contractor, Hart)!! There is nothing to affect him with knowledge of (or assent to) the transaction, or of this suit; or to show whether he is living or dead. Can a judgment be permitted to stand, based upon assumptions so obviously erroneous?

If the assignment (such as it is) "was absolutely null and void," then there was *no authority of law* for this payment to McKnight & Richardson. A payment by a public officer out of the public treasury to one not authorized (but even forbidden) to receive it, is an *illegal* payment—one unwarranted by law. It is not the case of an executed contract, for there not only never was any contract between the United States and these claimants, but the statute prohibited any such being made as is set up to justify the retention of this money. The Treasury officials could not make nor execute any such agreement, so as to bind the United States. There is no more right to retain the funds than a smuggler would have to assert a title to hold his contraband goods because the customs officers allowed them to pass without exacting a duty. If any man bought a claim against the government, he did an illegal act; whatever money he paid for the transfer was upon an illegal considera-

tion, and he must lose it. He has no equitable claim upon the republic whose laws and policy he has violated.

The concluding sentence of this paragraph is based upon another assumption of a fact not proved in the case, *i. e.*, that the payment was acquiesced in by the original creditor. There is no *proof* in the cause of *any fact*, beyond the existence of certain papers, and that on them $21,675.68 was paid to these petitioners. This *was* proved. (Record, 5; folio 11; finding iv.)

How can it be said that "it does not appear that the government has suffered, or can suffer any loss thereby"?

A large sum has been paid to men not entitled to receive one cent. Here is an apparent loss of at least $21,675.68. It can only be *conjectured* that this would have been called for by somebody else if not wrongfully paid to McKnight & Richardson, and this conjecture is based upon nothing which can properly be called evidence in a court of justice. It is not a correct statement to say that because $21,675.68 is *supposed* to be due to Hart, who (if he has the right to do so) never has called for it and never will, that no loss is sustained if that sum is paid to other men, who never had any right to demand it.

Waiving consideration of the first sentence of the next paragraph, which declares that by the payment to McKnight & Richardson Hart would be estopped to claim the money (proceeding upon the assumption, of which there is no proof, that Hart was ever entitled to anything himself, or that he ever authorized or knew of the payment), as the existence of such an estoppel is not an issue raised in the present case; I will ask the court to consider the conclusion of the paragraph, which indicates

the reason for giving the judgment dismissing the counter-claim, which the United States assign for error.

It says: "There is no reason, *therefore*, why the United States should recover back what has *thus* been paid *in good faith* and to the satisfaction of *all* parties interested, when there is *no other claimant* for the money, which (if recovered) the government *ought not to retain*."

Keeping constantly in mind that the case finds that there was no evidence that ever Hart delivered a pound of flour, or was ever entitled to receive a dollar from the United States, the assumptions of fact and conclusions of law in the foregoing sentence seem a little remarkable.

The question is not, however, whether there was or was not any "*other* claimant," but whether *these* claimants are lawfully entitled to *retain* what it is quite obvious they originally had no legal right to *receive*. It cannot properly be said that a payment is, in law, made "in good faith," when the making of it was in direct violation of a statute which, as a public officer and a good citizen, both the payor and payee were bound to know and to obey. *Magna culpa dolus est*. The very counter-claim under discussion shows that the payment was *not* "to the satisfaction of *all* the parties interested," if the government is permitted to have any concern about the disposition of the public funds.

The closing assumption is that the counter-claim should not be sustained because, "if recovered, the government ought not to retain" the money! That is, there should be no recovery of money improperly and illegally paid to A, to which he had no legal right, because, if restored to the proper custody, it *might* possibly have to be paid out to B! (Crockford *v.* Winter, 1 Campb., 127, cited *infra*.) This reason, too, rests upon the groundless as-

sumption that *somebody* was entitled to this money; in face of the findings that there was no proof of the delivery of flour, the so-called voucher not being proved, nor admissible in evidence to establish that fact, and it never having been recognized except in a way confessedly illegal.

As below remarked, in a little different connection, the public funds, collected from the people by taxation, are held *in trust* for governmental purposes. The legislature declares the manner of executing that trust, and no disbursing or accounting officer has any right to disregard those directions, nor has any citizen a right to claim any benefit from such disobedience of law. The trust is abused by both parties when money is paid out or received in violation of law. It can make no difference that the United States would be liable to Hart, *upon proof that he had performed some lawful contract, entitling him to this amount*, if these funds were recovered; until such proof is made the funds are lawfully held in public custody. "*By means of a false voucher the defendants dispossessed the trustee of money which the latter had a right to hold till the point was duly ascertained who was legally entitled to it.*" (Per Lord Ellenborough in Crockford *v.* Winter, 1 Campb., 127.)

This case is cited in Chitty on Contracts, 937, where that author says, "so, if money be obtained by fraud from a party who has *the present right to hold it*, this action will lie, *even although the defendant be really entitled to the money*; provided his right thereto depend upon a question not of common-law jurisdiction."

In Litt *v.* Martindale (18 C. B., 314), it was held that, though the plaintiff was owing the defendant, to the amount sought to be recovered, the defendant could

not retain the sum, if wrongfully obtained from the plaintiff's agent.

The real question and the only one is, are *these* parties entitled to retain this money, having received it in contemptuous violation of the plainest provisions of the statute?

All this inquiry involves is another application of the familiar principle, that the fraud, wrong, and negligence of public agents is not to be imputed to or to prejudice the rights of the government, though loss may result therefrom. (Hart *v.* United States, 95 U. S., 318, and cases cited.)

In this case, the Second Comptroller had power to ascertain and declare the true balance of Hart's account so as to preclude any further examination into *that* fact *except in court* or before Congress. He had *no* right to pass upon, much less to give validity and effect to, any pretended assignment of the claim.

"So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the *character* of the instrument. It is the negligence of the *principal* that binds; and that of the agent has no effect, except to the extent that it is chargeable to the principal." (Cooke *v.* United States, 91 U. S., 397, bottom.)

In that case the government sued to recover the amount paid by its assistant treasurer in New York to Jay Cooke & Co. for the redemption of eighteen spurious bonds. The payment was not in direct violation of the explicit terms of a statute, but upon a mistake as to the fact of genuineness of the government's own commercial paper; yet this court held that these facts would sustain a recovery. This "voucher" was not commercial

paper; if evidence of anything, it was of a claim in favor of Hart, to which the law denied the privilege even of assignability.

In Hart *v.* United States (95 U. S., 317, bottom), a defense was made that the collector, whose duty it was to see that liquors were not removed without prepayment of the tax (which was a lien thereon), allowed their removal without the tax being paid; upon which the court said (p. 318), "An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts." It was equally the duty of the Treasury officers to see that no claim was paid to an assignee in violation of the statute of 1853; and if so paid, the payment "did not bind the government."

It might be suggested that it was the laches or nonfeasance of the officer that was set up as a defense in that and similar cases; whereas it is a positive act which the government now seeks to invalidate, and to recover moneys paid out at the Treasury Department by the officer designated there to disburse the public funds.

Nevertheless, the principle is the same; as is evidenced from Cooke *v.* United States (91 U. S., 397, above cited, and those below mentioned).

"The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he, nor those who act under him, can dispense with or alter any of its provisions." (Tracy *v.* Swartwout, 10 Peters, 95; Mitchell *v.* Harmony, 13 Howard, 115.)

The law has been twice or thrice laid down recently

by this court, in exact conformity to the statement of it by Judge Story in his work on Agency, sec. 307*a*.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act." (Whiteside *v.* United States, 93 U. S., 257, citing cases; Hawkins *v.* United States, 96 U. S., 691, also citing cases, not necessary to be recited here.) The substance of the doctrine in that "the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority." (*Ibid.*) Judge Story concludes the section by observing: "And there is no hardship in requiring from private persons, dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the government." (Story on Agency, 307, *a*.)

There is not much difference between the case of one dealing with a public officer and with a private agent in a matter as to which the limitations of his power are known: the only difference is that, in the one case, the other party is *bound* to know the limitations of the public authority, and, in the other, has to be charged by proof with notice of the extent of a private agency. (Baltimore *v.* Reynolds, 20 Md., 10, 11; State *v.* Hays, 52 Mo., 580; Story on Agency, ch. vi, on "nature and extent of authority," §§ 62 to 78, 83, 88, 99; Atwood *v.* Munnings, 7 Barn. & Cr., 283, 284.)

In the one case, notice of the limitation of the authority conferred by statute is a *conclusive* presumption of law; in the other, the nature and extent of the delegated power,

paper; if evidence of anything, it was of a claim in favor of Hart, to which the law denied the privilege even of assignability.

In Hart *v.* United States (95 U. S., 317, bottom), a defense was made that the collector, whose duty it was to see that liquors were not removed without prepayment of the tax (which was a lien thereon), allowed their removal without the tax being paid; upon which the court said (p. 318), "An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts." It was equally the duty of the Treasury officers to see that no claim was paid to an assignee in violation of the statute of 1853; and if so paid, the payment "did not bind the government."

It might be suggested that it was the laches or nonfeasance of the officer that was set up as a defense in that and similar cases; whereas it is a positive act which the government now seeks to invalidate, and to recover moneys paid out at the Treasury Department by the officer designated there to disburse the public funds.

Nevertheless, the principle is the same; as is evidenced from Cooke *v.* United States (91 U. S., 397, above cited, and those below mentioned).

"The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he, nor those who act under him, can dispense with or alter any of its provisions." (Tracy *v.* Swartwout, 10 Peters, 95; Mitchell *v.* Harmony, 13 Howard, 115.)

The law has been twice or thrice laid down recently

by this court, in exact conformity to the statement of it by Judge Story in his work on Agency, sec. 307*a*.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act." (Whiteside *v.* United States, 93 U. S., 257, citing cases; Hawkins *v.* United States, 96 U. S., 691, also citing cases, not necessary to be recited here.) The substance of the doctrine in that "the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority." (*Ibid.*) Judge Story concludes the section by observing: "And there is no hardship in requiring from private persons, dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the government." (Story on Agency, 307, *a*.)

There is not much difference between the case of one dealing with a public officer and with a private agent in a matter as to which the limitations of his power are known: the only difference is that, in the one case, the other party is *bound* to know the limitations of the public authority, and, in the other, has to be charged by proof with notice of the extent of a private agency. (Baltimore *v.* Reynolds, 20 Md., 10, 11; State *v.* Hays, 52 Mo., 580; Story on Agency, ch. vi, on "nature and extent of authority," §§ 62 to 78, 83, 88, 99; Atwood *v.* Munnings, 7 Barn. & Cr., 283, 284.)

In the one case, notice of the limitation of the authority conferred by statute is a *conclusive* presumption of law; in the other, the nature and extent of the delegated power,

and the knowledge of its purpose and limits, are to be established, as questions of fact, by evidence. When ascertained, the effect is the same in both cases. (Story on Agency, *ubi sup.;* Atwood *v.* Munnings, 7 B. & C., 283, 284, and authorities *passim.*)

"When the transaction is made in a *mode* which is not within the scope of the authority confided to the agent, or with which the agent is not apparently clothed or held out to the public to be clothed, *no title to the property will be passed, and it may be reclaimed by the owner.* * * * But if the person dealing with such an agent [general private agent] has notice of such [his] instructions or variations [of apparent authority], *he cannot acquire any title to the property which is transferred in violation of them.*" (Story on Agency, § 224; 3 Chitty, Com. Law, 204, 205; Boyson *v.* Coles, 6 M. & S., 14.)

So, in the case of the Floyd acceptances (7 Wall., 679), it is said (quoting from United States *v.* Bank, 15 Peters, 377) that the holder of the draft was bound "to look to the genuineness of the acceptance and *the authority of the officer* to give it," and adding: "If this language has any significance, it is that the authority of the officer, like the genuiness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government." (7 Wall., 679.)

Why is not this just as true of a payment as of an acceptance?

That it is so, was declared by the late eminent district judge for Maine, who said: "It may, however, be objected that *if* it was paid by mistake, it was a mistake of law and not of fact, and that money paid under a mistake of law merely is subject to repetition. The principle, when stated in general terms and as a universal prop-

osition, is not, perhaps, entirely free from difficulty. * * * But however it may be when the money is paid by the supposed debtor, *no case* that I am aware of *has gone so far as to decide that an unauthorized payment by an agent from an erroneous opinion of the legal obligation of his principal shall be binding on the principal, and that he cannot recover back money thus unduly paid.*" (United States *v.* Bartlett, Davies, 19, bottom.) In that case the defendants were compelled to refund money paid to them by a collector of customs as fishing bounty for a vessel carrying enrolled papers (issued on the master's unauthorized oath as to ownership), which ought not to have been granted her, because the owners had made no oath as to the ownership. The issue of the documents by the collector without this oath was illegal; consequently the payment of bounty by him was also illegal, and it was recovered.

Hundreds of cases might be cited to show how uniformly and frequently courts all over the country have decided (what is really too obviously just to require decision) that a party is not bound by an act done by his agent known to the other party to be in excess of the agent's power.

Here the unauthorized act was a payment. Unless it can be recovered, the government *is* bound by the act done in the law's despite; there is no other way in this case to make effectual the legal proposition that the illegal act of its officer does not bind the government.

"Here, *in order to entitle the defendants to keep possession of this money, we must give validity to an illegal instrument.* On this ground only, the plaintiffs are entitled to recover," &c. (Martin *v.* Morgan, 3 Moore's Rep., 640, middle, per Dallas, C. J.)

The court thus expressed the law in Hawkins *v.* United States (96 U. S., 691, middle): "Such being the state of Congressional legislation, it necessarily follows that the *contractor* as well as the superintendent knew that the appropriations were to be expended by the Secretary, and that no one else was authorized to direct as to the character and construction of the building."

In this instance the claimants knew, as well as the accounting officers and the Treasurer, that there was no right to pay an assignee of an unliquidated claim, and there could be no right to *receive* what it is unlawful to *pay* out of the public Treasury. In this particular it stands differently from a transaction between individuals. There the defendant may retain the money if the plaintiff is in *pari delicto*, but the wrong-doing of its officers not being imputed to the government, the United States can never be *in delicto* in such a matter. (Cases cited *infra.*)

The public funds are held in trust for governmental purposes, to be disbursed therefor only and strictly according to law. Every officer who perverts these trust-funds by paying them out in contravention of the terms of the statute is (in law) a wrong-doer—guilty of a fraud upon the law, whether morally blamable or not, and he who receives the payment, known to be thus illegally made, is likewise culpable; equally a tort-feasor. It is a joint tort. (See cases cited *supra.*)

"Where an agent has paid money by some fraud or imposition practiced upon him, and *also where he himself has participated in a fraudulent payment to another person cognizant of the fraud, the principal may recover it back.*" Story on Agency, 8th ed., § 435, page 526, top, citing Clarke *v.* Shee, Cowp., 197, 200, and Taylor *v.* Plumer,

3 M. & S., 562, 574, where it is said by Lord Ellenborough, C. J.: "An abuse of trust can confer no rights on the party abusing it, *nor on those who claim in privity with him.*" (Wharton on Agency, § 180; Smith's Merc. Law, 190, 191.)

In the next section (§ 436) Story continues: "The tort or injury may be one in which the agent himself has been a party as well as the third person"; in which case both are jointly, as well as severally, liable. "§ 437. We may illustrate these principles by a few cases. Thus, if an agent tortiously converts the property of his principal; as, if he sells or pledges it to a third person, without right or authority, the latter will be generally liable, equally with the agent, for the conversion. *This doctrine applies in all cases where the third person knew and participated in the illegal or unauthorized act of conversion. It also applies in all cases of a special agency* (but not of a general agency), *even though the third person was not cognizant of or party to the tort, but acted bona fide and without notice.*" (Story on Agency, §§ 436, 437.)

In § 439, the distinguished author states the general principle, that the tort may be waived and assumpsit maintained; too familiar to permit of citations. (Wharton on Agency, §§ 414, 419.)

Wharton, in § 414, mentions the note of Mr. McLaren to the 7th edition (A. D. 1870) of 1 Bell's Com., 529, where it is said, "In the case of money or goods paid away by the agent for an illegal purpose, there will be a difference if he has done so as agent, but without authority, or has done so on his own account. In the former case, *the principal would be entitled to recover in any event;* in the latter, only by identifying the goods in the receiver's hands, * * * unless the defendant be proved cogni-

zant of the fact that the agent was dealing with the principal's property without authority."

"In the case of the Crown, the law will raise and create a privity so as to render him accountable who receives any of the king's money." (Atty. Gen. *v.* Perry, 2 Comyns, 494, citing Devonshire's case, 11 Co., 90, and Sir W. Mildmay's case, *Ib.*)

Delivering the opinion in Codaval *v.* Collins (6. Nev. & Man., 330), Lord Denman, C. J., said: "Mr. Platt has put the case upon the true ground. Is or is not the money sought to be recovered, the money of the plaintiff? It is. How did the defendant obtain that money? By fraud. That is denied; but the jury have found that it was obtained by fraud, *since they were of opinion that when the defendant made his claim he knew that it was not well founded.*" (6 N. & M., 330, near bottom.)

Discussing the action for money had and received, many years ago, the court of Tennessee summed up into classes the cases in which it lies: "2d. *To recover money paid under a void authority*, or upon an agreement declared void for irregularity by the legislature, *or by them declared void, being against public policy.*" (Boyd *v.* Anderson, 1 Overton, 442.)

In Mr. Frere's note to Jones *v.* Barkley (2 Douglass, 697, *a*, note F 7, item 2), it is said: "That where the law that creates the illegality in the transaction was designed for the coercion of one party, and the protection of the other, * * * * in these cases there is no parity of delictum at all between the parties, and the party so protected by the law * * * may at any time resort to the law for his remedy, though the illegal transaction be completed." (See Muttyloll Seal *v.* Dent, 8 Moore's P. C. Cas., 327, lower half; Evans' Essay on the Action for Money Had and Received, 28, 29.)

III.

As claimants' counsel have thought it worth while to print in full an old letter of the *First* Comptroller, I will briefly notice it. In the first place, it is not the opinion of the officer who is to adjust the balance of accounts for war expenditures, and was intended, probably, only for his own office. At all events, however good a lawyer he was, this court has held that he erred in this instance. It would be easy to show the unsoundness of his argument, were it any longer necessary to do so; but it would be superfluous.

"If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. If they supposed his decision to be wrong, they would, of course, so pronounce their judgment." (Decatur *v.* Paulding, 14 Peters, 515, middle; Tracy *v.* Swartwout, 10 Peters, 95; Locke *v.* United States, 3 Mason, 455.)

"Where the law clothes them [officers] with a discretionary power, they must exercise it upon their own responsibility; but it will not be denied that upon this court, and not upon any other officer or department of the State, is devolved the duty of interpreting its constitution and laws. And we have no doubt that, whenever the question is properly brought before us, and it is made to appear that any officer has acted without authority, it is our duty to declare such action illegal. And, in determining it, we are not bound by the interpretation which such officer, or any other officer, may have put upon the law declaring his powers. If we were, then he would constitute the highest judicial tribunal with respect to such laws, and this court would

be divested of that character." (State *v.* Hastings, 10 Wisc., 522, lower half.)

That repeated violations of law by an officer can make any one of the series a valid act can scarcely be contended. So far as the government is contravened in its declared policy, and injured by the illegal abstraction of funds, "it is absurd to say that any man transgresses a law, made for his own advantage, willingly." (Evans's Essay, &c., 29, citing Smith *v.* Bromley, Doug., 697.)

"One might almost as well defend an action for assault and battery by pleading that he had beaten the plaintiff every year for many years, and that this was the first time the plaintiff had ever complained." (Conger *v.* Dougherty, 43 N. Y., 120.)

It should be observed that there never was a case in which the propriety of this act of February 26, 1853 (R. S., § 3477), was more apparent. *There is no evidence that there ever was any real claim, or* (if one existed) *any attempt to assign it.* The assignment is assumed from the production of a voucher not verified, purporting to bear the signature of Simeon Hart to a blank receipt at the bottom of it. This is in law no assignment; nor, without more, any proof of the holder's right to receive the sum named in the voucher, even between individuals.

In this case, the voucher purports to be issued by one Grayson, a commissary of subsistence, to one Hart, who was a surety upon his (Grayson's) official bond.

By turning to the opinion mentioned in the case (14 Atty. Gen. Ops., 146), it will be seen that, immediately after its date, Mr. Hart entered upon a course of active disloyalty. Whether Grayson exchanged his blue uni-

form for a gray one does not appear upon the record. It is certain that Hart had no kindly feeling to prevent him from despoiling the government; that it is his principal, for whom he was bound, who issues the voucher; and that (in this case, at least) there is no further proof relative to this transaction.

I wish to reiterate emphatically this last suggestion. It must be borne in mind throughout the case *that there is not a particle of proof to show that Hart ever delivered a pound of flour*, upon contract or otherwise, *or that the United States ever owed him a dollar upon any account*, for the voucher, illegal upon its face, is not evidence here, and raises no such presumption; *nor that Hart ever attempted to transfer any claim*, if any he had. Then it clearly appears that the claimants are withholding money illegally paid them without showing any equitable or justifiable excuse for retaining it.

EDWIN B. SMITH,
Assistant Attorney-General.